

**STATE OF WISCONSIN**  
**Department of Commerce**

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*In the Matter of the PECFA Appeal of*

James Urban  
St Croix Oil  
2072 US Hwy 8  
St Croix Falls WI 54024-8113

PECFAClaim #54024-8147-72  
Hearing #02-106

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**FINAL DECISION**

**P R E L I M I N A R Y   R E C I T A L S**

Pursuant to a petition for hearing filed March 25, 2002, under §101.02(6)(e), Wis. Stats., and §Comm 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce, a hearing was commenced on August 1, 2002, at 201 West Washington Street, Madison, Wisconsin.

The issue for determination is whether the Department's decision dated February 25, 2002 was incorrect with regard to the items identified in Petitioner's Appeal filed on March 25, 2002.

There appeared in this matter the following persons:

**PARTIES IN INTEREST:**

James Urban  
St Croix Oil  
2072 US Hwy 8  
St Croix Falls WI 54024-8113

By: Steven J. Oseseck, Environmental Specialist

Envirogen  
1285 Rudy Street  
Onalaska, WI 54650-0684

Department of Commerce  
PECFA Bureau  
201 West Washington Avenue  
PO Box 7838  
Madison WI 53707-7838

By: John A. Kisiel  
Department of Commerce  
201 W. Washington Ave., Rm 322A  
PO Box 7838  
Madison WI 53707-7838

The authority to issue a proposed decision in this matter has been delegated to the undersigned by order of the Secretary dated July 2, 2002. The matter now being ready for decision, I hereby issue the following:

### **FINDINGS OF FACT**

1. At all times material, James Urban (hereinafter the "Appellant") was the legal owner of the premises located at 2072 US Hwy 8, St. Croix Falls, Wisconsin.
2. On or before 12/04/01, the Appellant filed a claim for reimbursement of expenses associated with site cleanup for the premises described in Paragraph 1 in the total amount of \$102,556.02 with the Wisconsin Department of Commerce, (hereinafter the "Department"). On February 25, 2002, the Department made reimbursement in the amount of \$94,266.54.

3. The Appellant appealed the Department's denial of the following elements of his initial claim:
  - a. \$500.00 for costs associated with Wisconsin's Department of Natural Resources (hereinafter the "DNR") landspreading fee.
  - b. \$130.98 (including but not limited to) in interest and bank fees that had accrued on the non-eligible costs identified in paragraph a, above.
4. As indicated by invoice dated 10/02/99 Appellant incurred the DNR fee in June 1999.

## **DISCUSSION AND CONCLUSIONS OF LAW**

### 1. Preliminary Matters

The Administrative Law Judge, overruling the Department's objections, takes judicial notice of PECFA Update #15, dated March 2001 and PECFA Update #17, dated November 2001, noting:

- a. the reliability of the published notices,
- b. the absence of undue prejudice to either party, and
- c. that rigid application of evidentiary rules runs contrary to administrative procedures. See, Pieper Elec., Inc. v. Labor and Industry Review Comm, 346 N.W.2d464, 118 Wis.2d 92 (1984).

The Administrative Law Judge notes for the record that the Department's attorney, by letter dated 7/7/02, informed the Appellant's representative that the Administrative Law Judge allegedly received information regarding the issue involved herein from a PECFA senior hydro geologist. The Department's attorney purports to raise an issue regarding the Administrative Law Judge's ability to render an impartial and fair decision in the present matter because of this alleged ex parte communication. The information to which the Administrative Law Judge had access did not influence or have any bearing on the Administrative Law Judge's decision. Any action regarding the Administrative Law Judge's discussion with the PECFA senior hydro geologist is not warranted, appropriate or necessary.

2. Substantive Matters.

Appellant seeks to prove the eligibility of the landspread fee by showing that the cost was incurred before the effective date of Wis. Stat. Sec 101.143(4)(c)(10) as revised, and by analogizing the landspread fee to the DNR's closure fees. Appellant argues that if closure fees were eligible for reimbursement by the Department prior to revision of Wis. Stat.

101.143(4)(c)(1), landspread fees should be also. Subsequent to the enactment of Wis. Stat. Sec. 101.143(4)(c)10, the parties agree that the fees itemized in NR 749 and charged by the DNR are not eligible for reimbursement by the Department of Commerce.

Reimbursement of this particular landspread fee, however, is not precluded by Wis. Stat. 101.143(4)(c)(10) since the enactment of this section occurred after the date the Appellant's landspread fee was incurred. Absent language indicating that the legislative revision applies retroactively, revised statutes take effect prospectively. Smith v. Sno Eagles

Snowmobile Club, Inc., 625 F. Supp. 1579, affirmed 823 F.2d 1193 (1986). See also, Appeal of Nancy Stuhlman, PECFA claim# 53072-5215-43 where that Administrative Law Judge ordered Appellant's full costs reimbursed, notwithstanding that an emergency rule limiting reimbursement, was enacted between the time the costs were incurred and the file was claimed.

The Appellant has the burden of proving that the denied costs are in fact eligible. See, Harold Born Estate, PECFA Claim # 54843-9530-98, decided March 13, 1997. The Appellant's burden here is great because an administrative agency's interpretation of its own rules is given significant weight unless such an interpretation is proven to be clearly erroneous. Irby v. Bablitch, 489 N.W. 2d 713, 170 Wis.2d 656 (1992).

While the DNR landspread fee relates to eligible costs outlined in Comm 47.30(1), the Appellant did not show persuasively, nor would have been able to show persuasively, that said fee fell squarely within one of the enumerated items in this section of Comm 47. To be able to prevail on its claim, therefore, the Appellant needs to prove that the Department of Commerce was clearly in error when it determined that the DNR landspread fee was "associated with, but not integral to," the remediation process according to Comm 47.30(2)(a)(15).

Aside from analogizing the landspread fee to the DNR's closure fee, the Appellant did not provide other information indicating that the landspread fee was a cost identified by the Department as integral. While this fee may have been unavoidable to the clean up of the Appellant's specific site according to DNR requirements, this fact alone does not mean the fee is automatically elevated to one that is "integral" to the remediation process. The Department's

decision to deny eligibility is not made in a vacuum. Rather the Department must constantly evaluate the necessity of one cost over another as it prioritizes expenses for reimbursement.

This Judge notes that the DNR does not specifically list landspreading fees as a cost enumerated in Chapt. NR 749 Table 1 Fee Schedule. The Judge also notes that the Department of Commerce did not refer to landspreading fees in its PECFA Update #15 when it addressed denial of DNR fees generally and also DNR closure review fees, GIS recording fees, and Voluntary Party Liability Exemption Program fees, specifically. An inference can be drawn from the omitted references to landspreading fees in both of these public notices that such fees were not improperly characterized as something other than “integral” by the Department of Commerce. Finally, though Wis. Stat. 101.143(4)(c)(10) does not dictate the ineligibility of this cost because the revision was not in effect at the time the cost was incurred; said revision is probative of the reasonableness of the Department’s characterization of the landspreading fee as one other than “integral” to the remedial process.

Without information beyond analogy to DNR closure fees, the Appellant fails to adequately prove that the Department’s characterization of the landspreading fee as ineligible was clearly erroneous. Admittedly, persuasive evidence, other than the DNR’s requirement, sufficient to overturn the Department’s decision is not readily obtainable. However, the PECFA program assists property owners who are required to remove petroleum contaminants. To be able to do so, it must establish limits on reimbursements so that funds are conserved for the most integral remedial actions.

**DECISION**

The Department's decision to deny reimbursement is affirmed. The Appellant is not entitled to any further reimbursement, including interest and bank fees, of the amounts in dispute.

Dated: \_\_\_\_\_

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Mari A. Samaras-White  
Administrative Law Judge  
Department of Commerce  
PO Box 7970  
Madison WI 53707-7970

**Copies to:**

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St Croix Oil  
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## **REQUEST FOR REHEARING/JUDICIAL REVIEW**

**Hearing #02-106**  
**Commerce # 54024-8147-72**

### **Request for New Hearing**

**Petitions for new hearings must be received no later than 20 days after the mailing date of this hearing decision.**

If, after you receive the decision, you believe it was based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. **To ask for a new hearing**, send or deliver a written request to Rehearing Request, Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6<sup>th</sup> Floor, PO Box 7970, Madison, WI 53707-7970. Rehearing requests may also be filed by fax at the following number: (608) 266-3447. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

Your request must explain why you believe the hearing examiner's decision is wrong. If you have new evidence to submit, you must describe your new evidence and explain why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or on the discovery of new evidence which could not have previously been obtained through due diligence on your part, your request will be denied.

The petition for new hearing must also be sent or faxed to all other parties named in this decision as "PARTIES IN INTEREST." **Late requests cannot be granted.** The process for asking for a new hearing is in Sec. 227.49 of the state statutes

### **Petition For Judicial Review**

**Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision** as indicated below (or 30 days after a denial of rehearing, if you ask



for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6<sup>th</sup> Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on all other parties named as "PARTIES IN INTEREST". **Late requests cannot be granted.** The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: \_\_\_\_\_

**PARTIES IN INTEREST:**

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John A. Kisiel  
Assistant Legal Counsel  
Office of the Secretary  
Department of Commerce

Date Mailed: \_\_\_\_\_

Mailed By: \_\_\_\_\_

